

## **REMARKS**

In the Office Action dated March 19, 2008, claims 15-32 were presented for examination. Claims 15-32 objected to as containing an informality with respect to “hierarchical node.” Claims 15-32 were rejected under 35 U.S.C. §101 as being directed to non-statutory subject matter. Claims 15, 21, and 27 were rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. Claims 15-32 were rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Claims 15-32 were rejected under 35 U.S.C. §102(a) as being anticipated by Applicant’s Admitted Prior Art (AAPA).

The following remarks are provided in support of the pending claims and responsive to the Office Action of March 19, 2008 for the pending application.

### **I. Objection to the Claims**

In the Office Action dated March 19, 2008, claims 15-32 were objected to as containing an informality. More specifically, the Examiner objected to the term “hierarchical node” and has requested that this term “should be replaced with a node pertaining to a particular level.” See Office Action page 3. Applicant has amended the recitation of “hierarchical node” to refer to the next higher level in the tree structure, as the claimed invention pertains to promotion of items organized in a tree structure. No new matter has been added to the application with the amendments presented herein. In fact, the amendments presented are based upon the suggestion(s) by the Examiner. Accordingly, Applicant respectfully requests entry of the amendment and removal of the objection to the claims.

### **II. Rejection Under 35 U.S.C. §101**

In the Office Action dated March 19, 2008, the Examiner assigned to the application rejected claims 15-32 under 35 U.S.C. §101, as being directed to non-statutory subject matter. More specifically, the Examiner indicated that “independent claims 15, 21 and 27 do not involve transformation of article or physical object to a different state or thing, they merely recite

processing data items.”<sup>1</sup> Applicant has amended each of claims 15, 21, and 27 to recite that the merged data items form a single output stream. A single output stream is a concrete and useful item. It is the single output stream formed by the merge of multiple input stream that is a tangible and concrete result. There is no statutory requirement that Applicant recite how they intend to use the output stream. The useful and tangible result can be the output stream itself. Accordingly, Applicant respectfully requests that the Examiner reconsider this rejection and remove the rejection of claims 15-32 under 35 U.S.C. §101.

### **III. Rejection of Claims 15, 21, and 27 under 35 U.S.C. §112, first paragraph**

In the Office Action dated March 15, 2008, the Examiner assigned to the application rejected claims 15, 21, and 27 under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement.

More specifically, the Examiner has raised an issue with the phrases pertaining to promoting, and hierarchical node, and states that those elements were not properly described in the specification. Applicant respectfully disagrees with the Examiner with respect to this rejection. “The examiner has the initial burden of presenting evidence or reasoning to explain why persons skilled in the art would not recognize in the original disclosure a description of the invention defined by the claims.”<sup>2</sup> The Examiner cannot merely assert in a blanket statement that the claims fail to comply with the written description requirement. “A description as filed is presumed to be adequate, unless or until sufficient evidence or reasoning to the contrary has been presented by the examiner to rebut the presumption.”<sup>3</sup> However, the Examiner has not produced any such evidence of reasoning. Applicant respectfully disagrees with the Examiners rejection of these claims as failing to comply with the written description requirement. Furthermore, the Examiner has not produced any evidence to support their position. Accordingly, Applicant

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<sup>1</sup> See Office Action dated January 18, 2007, Page 2.

<sup>2</sup> MPEP §2163, citing *Wertheim*, 541 F.2d at 263, 191 USPQ at 97.

<sup>3</sup> MPEP §2163, citing *In re Marzocchi*, 439 F.2d 220, 224, 169 USPQ 367, 370 (CCPA 1971).

respectfully requests that the Examiner remove the rejection of claims 15, 21, and 27 under 35 U.S.C. §112, first paragraph, and grant allowance thereof.

**IV. Rejection of claims 15-32 under 35 U.S.C. §112, second paragraph**

In the Office Action dated March 19, 2008, the Examiner assigned to the application rejected claims 15-32 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

Applicant respectfully objects to the Examiner's position that the claimed elements of promotion with use of the status identifiers is indefinite. Applicant has both set forth the subject matter of the invention, and has defined the metes and bound of the subject matter.<sup>4</sup> The Examiner has not recited how or why the step of promotion is indefinite. In fact, the claims are specific that each data item has an associated identifier. These identifiers are compared, and based upon the comparison data items may be moved to a next level in the binary tree structure. Applicant respectfully disagrees with the Examiner, and the subjective nature of this rejection. Accordingly, Applicant requests removal of the rejection of claims 15-32 under 35 U.S.C. §112, second paragraph, and respectfully requests that the Examiner direct allowance thereof.

**V. Rejection of claims 15-32 under 35 U.S.C. §102(b)**

In the Office Action dated August 7, 2007, the Examiner assigned to the application rejected claims 15-32 under 35 U.S.C. §102(a) as being anticipated by Applicant's Admitted Prior Art (AAPA).

The remarks pertaining to AAPA provided in the response to the prior Office Actions are hereby incorporated by reference.

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<sup>4</sup>See MPEP §2171.

The Examiner notes in this section of the Office Action the Interview dated November 8, 2007 and signature of both the Examiner and Applicant's Attorney. It should be noted that this Interview Summary was not signed by Applicant's Attorney. The only signature present is by the Examiner. The initials of Applicant's Attorney is merely to signify presence at the interview. Applicant's Attorney is required to submit a separate interview summary, which was provided by Applicant's Attorney in the prior communication. In fact, the summary as provided by the Examiner is sparse in detail and does not elaborate on the items discussed during the interview.

However, regardless of the Interview, it is Applicant's position that the prior art does not teach the omission of a node identifier comparison in the manner claimed by Applicant. It is Applicant's position that the Examiner is improperly citing AAPA. As noted on page 1 of AAPA, there is an omission. However, the omission of AAPA refers to the swap and is "after the key comparison." In other words, AAPA requires the key comparison. Applicant's claimed omission refers directly to omission of the comparison itself under limited circumstances. The omission of AAPA and the omission claimed by Applicant are directed to two very different omissions and are not comparable or equivalent.

Since AAPA does not teach all of the limitations set forth in Applicant's amended claims, it is Applicant's position that the rejection under AAPA should be removed. Accordingly, Applicant respectfully requests removal of the rejection of the pending claims under 35 U.S.C. § 102(a), and that the Examiner direct allowance of claims 15-32.

## **VI. Conclusion**

Applicant believes that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. No new subject matter has been added to the application with the amendment to the claims presented herewith. Furthermore, Applicant is not conceding in this application that the claims are not patentable over the art cited by the Examiner, as the present claim amendments and cancellations are only for facilitating expeditious prosecution of the allowable subject matter noted by the Examiner.

Applicant respectfully reserves the right to pursue these and other claims in one or more continuations and/or divisional patent applications. Accordingly, Applicant requests that the Examiner indicate allowability of claims 15-32, and that the application pass to issue. If the Examiner believes, for any reason, that personal communication will expedite prosecution of the application, the Examiner is hereby invited to telephone the undersigned at the number provided.

Respectfully submitted,

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